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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-364

UNITED STATES OF AMERICA,

Petitioner,

v.

WILLIAM G. HALE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

QUESTION PRESENTED

Whether the Fifth Amendment bars cross-examination of a defendant who has given exculpatory testimony at trial as to why he failed to offer such information at the time of his arrest.

SUMMARY OF ARGUMENT

The Fifth Amendment privilege against self-incrimination which extends to custodial interrogation at the stationhouse gives the accused in a criminal case, innocent and guilty alike, the right to remain silent. The privilege also forbids comment on the exercise of the privilege because of the danger that the jury will draw the impermissible inference of guilt from silence. If, on the one hand, the accused has the right to remain silent but, on the other hand, the exercise of the right could be used to suggest his guilt, the privilege would be meaningless. It also is impermissible to comment on the defendant's silence at the stationhouse on cross-examination of the defendant at trial because the danger of the impermissible inference is present and is not likely to be eliminated by cautionary instructions. In addition, impeachment use of silence is improper because silence is perfectly consistent with the trial testimony of the accused and sheds no light on credibility. Silence at arrest is not inconsistent with the offer of exculpatory testimony by the defendant at his trial. Even an accused with the benefit of counsel might prefer to offer his testimony to a jury at trial rather than to the police at the stationhouse.

It is unfair for the government to warn the accused that he has the right to remain silent and that anything he says can be used against him, and to then use his silence to impeach his trial testimony. If silence could be used to impeach, the uncounseled accused at the stationhouse would be forced to choose between his right to remain silent and the full enjoyment of his

right to testify in his own defense at trial. Such a choice between competing constitutional rights is impermissible. In addition, the police would possess a tactic whereby they could secure incriminating "evidence" from the accused merely by asking him a question. If he responds, his inculpatory statements could be used to show guilt and his exculpatory statements could be used to impeach his trial testimony. If he does not respond, his silence could be used to impeach his trial testimony and suggest guilt. The government would be relieved of their burden to shoulder the entire load of the prosecution and the dignity of the accused would suffer. The defendant who testifies at his trial should not be deemed to have retroactively waived his right to remain silent at the stationhouse.

ARGUMENT

Legal scholars agree that one important reason for inclusion of the Fifth Amendment privilege against self-incrimination in the Constitution was the inquisitorial practices of the English Courts of Star Chamber and High Commission. *See* 8 WIGMORE, EVIDENCE §2251 (McNaughton rev. 1961). In *Brown v. Walker*, 161 U.S. 591, 597 (1896), it is stated:

> But, however adopted, it [the privilege] has become firmly embedded in English, as well as American jurisprudence. So deeply did the inequities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right

> to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.

Two branches of the privilege have developed: the privilege of an accused in a criminal proceeding and the privilege of a witness. McCORMICK, EVIDENCE §116 (1972). The privilege of a witness, to invoke the privilege on a question by question basis, McCORMICK, EVIDENCE §§134-140 (1972), is not involved in the present case. We are here concerned with the privilege of an accused in a criminal proceeding which guarantees to him the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty, . . . , for such silence." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

The privilege may sometimes be "a shelter to the guilty" but it is also "a protection to the innocent." *Quinn v. United States*, 349 U.S. 155, 162 (1955). As stated in *Ullmann v. United States*, 350 U.S. 422, 426 (1956):

> Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. [footnote omitted].

And again in *Slochower v. Board of Education*, 350 U.S. 551, 557-558 (1956), it is stated:

> At the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth

> Amendment. . . . The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. As we pointed out in *Ullmann*, a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances.

There are many reasons why an innocent defendant may not want to testify in his defense. In discussing the federal statute which provides that no presumption can be drawn from the failure of a defendant to testify, the Court stated in *Wilson v. United States*, 149 U.S. 60, 66 (1893):

> It is not everyone who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand. The statute, in tenderness to the weakness of those who from the causes mentioned might refuse to ask to be a witness, particularly when they may have been in some degree compromised by their association with others, declares that the failure of the defendant in a criminal action to request to be a witness shall not create any persumption against him.

There are two main policy reasons for the privilege as applied to the normal processes of criminal investigation

which the majority looked to, were: 1) Halperin maintained that he was innocent, 2) he was a compelled, and not a voluntary, witness, 3) he was not represented by counsel, 4) he could summon no witnesses, 5) he had no opportunity to cross-examine the witnesses testifying against him, 6) the proceeding was a secret one, and 7) he was already considered a potential defendant. The above circumstances are analogous to the situation of Mr. Hale at the stationhouse. Thus, it would seem that *Grunewald* would be controlling on the question of inconsistency and that under the circumstances of Hale's arrest, his exercise of the privilege was wholly consistent with innocence and was not inconsistent with his later trial testimony.

Having decided that Halperin's exercise of the privilege lacked probative value as an inconsistent statement or as inconsistent conduct, the Court then considered whether the introduction of the evidence was prejudicial. The Court concluded that there was a danger that the jury impermissibly used the testimony by equating the exercise of the privilege with guilt even though they were instructed by the judge that the evidence was relevant only to credibility. 385 U.S. at 424. Since there was prejudice with "grave constitutional overtones" the Court exercised its supervisory power over the administration of federal criminal justice to rule on the matter and reverse the judgment of conviction.

Hale's exercise of the privilege at the stationhouse lacked probative value as an inconsistent statement or

as inconsistent conduct.[9] The introduction of his evidence was also prejudicial. There was the same danger present in Hale's case as in Halperin's: that the jury impermissibly used the evidence by equating the silence of Mr. Hale at the stationhouse with guilt. The possibility that the jury will infer guilt from such silence even though they are instructed not to do so is certainly strong. *See Bruno v. United States*, 308 U.S. 287 (1939).

As Jerome Frank argued, the Fifth Amendment privilege has gotten an undeserved bad name. In the public mind, the explicit assertion of the privilege–like silence in reliance on the privilege–may be a badge of guilt. Bringing the defendant's silence before the jury, for any reason, will create the danger that they will infer guilt from his reliance on his constitutional right. *United States v. Grunewald*, 233 F.2d 566, 575 (2d Cir.

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[9]In addition to finding that the attempted impeachment was erroneous because potential prejudice outweighed probativity, the court below held that the error was harmful. The attempted curative instruction was inadequate, the court said, given "the weak testimony" of the complaining witness and "limited probity" of the other evidence against Mr. Hale. *United States v. Anderson*, 498 F.2d 1038, 1045 (D.C. Cir. 1974); Petition for Certiorari 13A. The question of the harmfulness of the error split the court below. *See* 498 F.2d at 1053-54; Petition for Certiorari 31A-33A (Wilkey, J., dissenting). The government has not sought review of that question in this Court. Petition for Certiorari n.2; Brief for the United States n.5. Hence, the government does "not rely here on any argument that the district court's caution to the jury was sufficient to obviate the error, if error there was." Petition for Certiorari n.1; Brief for the United States, n.4. *But see* Brief for the United States 54.

and prosecution today. See generally 8 WIGMORE, EVIDENCE §2251 (McNaughton rev. 1961). One of these is that the privilege contributes toward "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load." *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964), quoting from 8 WIGMORE, EVIDENCE §2251 (McNaughton rev. 1961). *See Michigan v. Tucker*, 417 U.S. 433, 449 (1974); *Miranda v. Arizona*, 384 U.S. 436, 460 (1966); *Tehan v. Shott*, 382 U.S. 406, 415 (1966). The reason for requiring such a balance is "our preference for an accusatorial rather than an inquisitorial system of criminal justice." *Murphy*, 378 U.S. at 55.

"[T]he American system of criminal prosecution is accusatorial, not inquisitorial, and ... the Fifth Amendment privilege is its essential mainstay." *Malloy v. Hogan*, 378 U.S. 1, 7 (1964). It was also stated in *Malloy*, 378 U.S. at 8:

> [O]ur accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the simple expedient of compelling it from his own mouth.

The other major policy reason for the privilege is closely alligned to the first: the privilege prevents the eliciting of self-incriminating statements by inhumane treatment and abuses and respects "the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life.'" *Murphy*, 378 U.S. at 55, quoting from

United States v. Grunewald, 233 F.2d 556, 581-582 (1956) (Frank, J., dissenting), *rev'd.* 353 U.S. 391. See *Tehan v. Shott*, 382 U.S. 406, 416 (1966). In terms of human dignity, the privilege "registers an important advance in the development of our liberty– 'one of the great landmarks in man's struggle to make himself civilized.'" *Ullmann v. United States*, 350 U.S. 422, 426 (1956), quoting from Griswold, THE FIFTH AMENDMENT TODAY 7 (1955). *See Miranda*, 384 U.S. at 360; *Commonwealth v. Dravecz*, 424 Pa. 582, 227 A2d 904 (1967). If an accused can:

> ... be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradiction, ... is ... painfully evident.... [*Brown v. Walker*, 161 U.S. 591, 596 (1896)].

Thus, self-incriminating statements have been viewed with distrust, *Murphy*, 378 U.S. at 55, and have been considered to be unreliable evidence. *See, e.g., Bram v. United States*, 168 U.S. 532 (1897). Indeed, the Court in *Escobedo v. Illinois*, 378 U.S. 478, 488-489 (1964), stated that "a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation." [footnote omitted].

The privilege against self-incrimination also forbids comment on the exercise of the privilege. *Griffin v.*

California, *380 U.S. 609 (1965)*.[1] If the accused has the right to remain silent but the exercise of the right could be used to show his guilt, the privilege would be meaningless. As stated in *Griffin*, 380 U.S. at 614: "[C]omment on the refusal to testify is a remanant of the 'inquisitorial system of criminal justice.'" Citing from *Murphy*, 378 U.S. at 55.

The privilege of the accused to remain silent extends to interrogation at the police station as well as to the trial itself. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Bram v. United States*, 168 U.S. 532 (1897). The no comment rule also extends to silence at the stationhouse. *Miranda*, 384 U.S. at n. 37. *Miranda* established as procedural safeguards to protect the privilege, a series of warnings which must be given to the accused who is subjected to custodial interrogation. Unless these warnings are given and a waiver of the privilege is secured, any statements made by the accused will be excluded from evidence in his trial. The *Miranda* exclusionary rule exists as a deterent to police officers who might be tempted to violate the right of the

[1] Historically a defendant in a criminal proceeding was incompetent to testify in his defense. A federal statute, 18 U.S.C. §3481, provides that a defendant is competent to testify in his own defense and that no presumption can be drawn from his failure to testify. This provision has been interpreted to mean that comment on the defendant's silence is reversible error. *Wilson v. United States*, 149 U.S. 60 (1893). The Court did not face the constitutionality of commenting on silence until *Griffin* because the statute controlled federal cases and the Fifth Amendment privilege was not applied to the states until *Malloy v. Hogan*, 378 U.S. 1 (1964). *See Abramson v. California*, 332 U.S. 46 (1947).

accused to remain silent. See *Michigan v. Tucker*, 417 U.S. 433, 433-444 (1974). *Harris v. New York*, 401 U.S. 222 (1971), allows impeachment by statements made by the accused at the stationhouse, which are inconsistent with his trial testimony, even though the procedural safeguards of *Miranda* were not complied with.

The *Griffin* rule which would not allow comment at trial on the exercise of the privilege by the accused exists independently of *Miranda*. The introduction of evidence of silence would amount to a violation of the privilege itself. Such is the case here; the prosecutor impeached the trial testimony of Mr. Hale by referring to the fact that he chose to remain silent at the stationhouse.

In view of the fact that the privilege against self-incrimination and the no comment rule are involved in this case, it should be remembered that the privilege is not to be applied narrowly or begrudgingly, *Twining v. New Jersey*, 211 U.S. 78, 91 (1908); *Ullmann v. United States*, 350 U.S. 422, 426 (1956), for the privilege is "as broad as the mischief against which it seeks to guard." *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892).

I.

IMPEACHMENT OF A DEFENDANT WHO OFFERS EXCULPATORY TESTIMONY AT HIS TRIAL BY HIS SILENCE AT THE POLICE STATION AFTER HIS ARREST AND RECEIPT OF *MIRANDA* WARNINGS VIOLATES HIS PRIVILEGE AGAINST SELF-INCRIMINATION.

A. Silence of an accused at the police station following his arrest and receipt of Miranda warnings is not inconsistent with the accused's offer of exculpatory testimony at his trial and reference to that silence at trial is prejudicial.

When a defendant takes the stand at trial and testifies in his own defense, he may be impeached on cross-examination by matters which *relate to his credibility* as a witness even though those matters might not otherwise be brought to the jury's attention. Evidence of prior convictions, *Spencer v. Texas*, 385 U.S. 554 (1967), and character evidence, *Michelson v. United States*, 335 U.S. 469 (1948), may be brought out by the prosecutor to aid the jury in determining if the defendant is a truthful person. Narcotics unlawfully seized in a separate prosecution have been allowed to be used for impeaching a defendant when on direct examination he denied ever in his life having possessed narcotics. *Walder v. United States*, 347 U.S. 62 (1954). Statements made during police interrogation without proper *Miranda* warnings which are inconsistent with the defendant's testimony at trial can be used to impeach. *Harris v. New York*, 401 U.S. 222 (1971). It

is contended by the government in this case that Mr. Hale's silence at the police station is inconsistent with his exculpatory testimony at trial.

Mr. Hale had been identified on the street by the victim as one of the persons who robbed him (Tr.39), arrested for the robbery, taken into the police station, searched, and advised of his right to remain silent. (Tr.259). Mr. Hale was no stranger to police procedures, having been arrested on a previous occasion. (Tr.253-254). From the prosecutor's remarks at the bench (Appendix 5), it appears that Mr. Hale was asked by the police where he got the $158 he was carrying and whether he was working. Mr. Hale refused to reply to the questions: "He wouldn't say anything." Appendix 5. It is this silence which the government argues is inconsistent with Mr. Hale's trial testimony that he had received the money from his wife who had just cashed a welfare check and had asked him to purchase some money orders for her.

It is a uniformly recognized principle of evidence that the credibility of a person who takes the witness stand to testify may be impeached by the showing of a prior inconsistent statement made by the witness. McCORMICK, EVIDENCE §§34-37 (1972). Mr. Hale made no statement at the police station. The Federal Rules of Evidence, Rule 801(a), define "statement" as follows: "A 'statement' is (1) an oral or written assertion or (2) non-verbal conduct of a person, if it is intended by him as an assertion." Even if Mr. Hale's silence is considered to be a statement or conduct, in order to use it for impeachment, it must be inconsistent. It must amount to an "assertion" contrary

to his later assertion at trial. A failure to assert a fact can only be considered an assertion of the non-existence of the fact if it would have been natural under the circumstances to assert the fact. 3 A WIGMORE, EVIDENCE §1042 (Chadbourn rev. 1972). The question thus becomes whether it would be natural for Mr. Hale to tell the police under the above stated circumstances that he received the money from his wife.

Similar considerations apply to the determination of whether silence can be used as a tacit admission (adoption of the statement of another by silence). *See* 4 WIGMORE, EVIDENCE §1071 (Chadbourn rev. (1972)); *see also United States v. Brinson*, 411 F.2d 1057 (6 Cir. 1969). Prior to the introduction into evidence of silence as a statement, it must be found that there was a confrontation or a statement which would under the circumstances naturally call for a reply.[2]

Many jurisidctions have adopted a "per se" rule that the arrest of an accused excludes evidence of a

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[2] *See* Note, "Tacit Criminal Admissions", 112 U.Penn.L.Rev. 210, 215-16 (1963), where it is stated:

> [C]ourts generally have imposed seven conditions for the introduction of evidence that an alleged admission by silence occurred. If silence is the only response by the defendant, the accusation must have occurred (1) in the defendant's presence and (2) within his hearing; (3) he must have understood it; (4) it ordinarily must have embraced facts within his personal knowledge; (5) he must have been physically able to speak and (6) psychologically at liberty to speak; and (7) the statement and surrounding circumstances must have naturally called for a reply. [Footnote omitted].

subsequent admission by silence.[3] As stated in *People v. Simmons*, 28 Cal.2d 699, 172 P.2d 18, 26 (1946):

> It is also apparent that when a person is in the hands of his accusers he may well and soundly conclude that his best interests will be served by silence, evasiveness, or equivocation. For this reason, in a number of jurisdictions it has been held that the mere fact of arrest is sufficient to render inadmissible the fact of the accused's failure to deny accusatory statements when made in his presence and hearing. These courts maintain that it is the common knowledge and belief of men in general that silence while under arrest is most conducive to the welfare of an accused whether he be guilty or innocent; that the maintenance of silence is the best strategic policy for one in the custody of the law, and that it is entirely consistent with innocence. [citations omitted].

In *Kelly v. United States*, 99 U.S. App. D.C. 13, 236 F.2d 746, 749 (1956), the court discussed some of the motives which might cause an accused under arrest to remain silent. The court quoted from the case of *State v. Hester*, 137 S.C. 145, 185, 134 S.E. 885, 898-899 (1926):

> [I]t cannot be disputed that many people, and even persons who are entirely innocent of wrongdoing, are afraid to talk in the presence of detectives. We must not forget, too, that from time immemorial it has generally been conceded an unwise thing for those charged with criminal offenses to talk to anybody and everybody about

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[3] 4 WIGMORE, EVIDENCE §1072 (Chadbourn rev. 1972); *Developments in the Law, Confessions*, 79 HARV.L.REV. 935, 1038 (1966).

their cases, and especially to engage in conversation with those who may not be friendly to them. For years and years the members of the bar have cautioned their clients not to discuss their cases with those with whom they come in contact, unless absolutely assured of their freindship, many good lawyers have advised clients to refrain from talking at all. This has been the practice so long that it has beome a well-known fact to our people generally.

The court also quoted from the case of *O'Hearn v. State*, 79 Neb. 513, 522, 113 N.W. 130, 134 (1907):

> [T]he very surroundings of the accused in such cases are such as to render it entirely proper and natural for him to keep silent in the fear of misquotation or misconstruction. A person in such a situation would naturally fear that the worst possible interpretation would be placed upon his language, that the memories of those present would lean to statements prejudicial to his interests, and that an officer seeking to convict might supply through zeal any defect in the statement which was actually made.

As the above cases indicate, our citizens have long understood that it is best to remain silent when arrested whether they are innocent or guilty,[4] at least until

[4] As discussed in *Commonwealth v. Dravecz*, 424 Pa. 582, 227 A.2d 904, 907 (1967), many proverbs teach the wisdom of silence:

> Silence is Golden; Closed lips hurt no one, speaking may; Speech is of time, silence is of eternity; For words divide and rend, but silence is most noble till the end; And Silence like a poultice comes to heal the blows of sound; Be silent and safe, silence never betrays you.

Not mentioned but equally applicable is the proverb: "The toungue is the enemy of the neck."

there is an opportunity to confer with counsel. This is the prevalent advice given by counsel to their clients. "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." *Escobedo v. Illinois*, 378 U.S. 478, 488 (1964), quoting from *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part and dissenting in part). In *Fowle v. United States*, 410 F.2d 48, 50 (9 Cir. 1969), the court observed:

> There are, however situations in which an accused is clearly under no duty to speak and where there are important reasons, regardless of guilt or innocence, for his maintaining silence. In such circumstances, since innocent and guilty alike may choose to stand mute, silence, even in the face of accusation, is highly ambiguous; hence, proof of such former silence should be excluded under universally recognized principles of evidence.

In addition to the fact of his arrest, Mr. Hale was specifically told by the police that he had a right to remain silent, that anything he said could be used against him, that he had the right to consult with a lawyer and to the presence of a lawyer during questioning, and that if he could not afford a lawyer, one would be appointed to represent him prior to any questioning. *See Miranda v. Arizona*, 384 U.S. 436 (1966). Particularly in view of this warning, as an evidentiary matter, silence at the police station after his arrest is not inconsistent with Mr. Hale's offering of exculpatory testimony at his trial. There is simply no inconsistent statement or conduct for use as impeaching material. Mr. Hale was exercising or enjoying[5] his

[5] *See* Brief for United States, pages 25-26.

constitutional rights to remain silent and to consult with counsel. As *Miranda*, 384 U.S. at 475, makes clear, a valid waiver of these rights will not be presumed simply from silence; rather, there must be an express statement by the accused that he is willing to make a statement and that he does not want an attorney.[6]

As stated in *Fagundes v. United States*, 340 F.2d 673, 677 (1 Cir. 1965):

> When one takes the stand in his own defense he of course puts his credibility as a witness in issue. Nevertheless we think it reversible error to permit evidence of refusal to talk and of request for counsel on arrest to be used for the purpose of impeachment. In the first place such evidence is ambiguous. Fagundes' words when arrested can as well be taken as indicating reliance upon constitutional rights as supporting an inference that his ability was an afterthought. There is nothing to indicate which interpretation is more probable.

And in *Johnson v. Patterson*, 475 F.2d 1066, 1068 (10 Cir. 1973), it was observed that:

> [S]ilence at the time of arrest is not an inconsistent or contradictory statement. Silence at

[6]The right to consult with counsel and have counsel present at the interrogation is indispensible to the protection of the Fifth Amendment. *Miranda v. Arizona*, 384 U.S. 436, 469-470 (1966); *see also Maness v. Meyers*, ____ U.S. ____, ____, 95 S.Ct. 584, 595-596 (1975). If silence is viewed as a desire to speak with counsel before talking to the police, impeachment would be clearly inappropriate. *See, e.g., United States ex rel Macon v. Yeager*, 476 F.2d 613 (3 Cir. 1973); *Baker v. United States*, 357 F.2d 11 (5 Cir. 1966). Nor does the act of testifying in his own defense waive the earlier right to counsel at the stationhouse. *Cf. Loper v. Beto*, 405 U.S. 473 (1972).

> the time of arrest is simply the exercise of a constitutional right that all persons enjoy without qualification.

The above language in *Johnson* was quoted approvingly in *United States v. Anderson*, 498 F.2d 1038, 1042 (D.C. Cir. 1974), Petition for Certiorari 7 A.

In *Grunewald, v. United States*, 353 U.S. 391 (1957), a witness before a grand jury investigating corruption in the Bureau of Internal Revenue declined to answer a number of questions directed to him on the ground that the answers would tend to incriminate him.[7] The witness, Mr. Halperin, was later indicted for conspiracy to defraud the United States with reference to certain tax matters. At his trial, Mr. Halperin took the stand to testify in his defense. On cross-examination the prosecutor brought out for the purpose of impeachment the earlier invocation of the Fifth Amendment by the defendant on the subject matter to which he had just testified. The Court held that under the circumstances there presented, Halperin's exercise of the privilege was wholly consistent with innocence and that it was not inconsistent with his later trial testimony.[8] The circumstances in *Grunewald*, 353 U.S. at 422-423,

[7]A witness does not have the right to remain silent completely as does an accused. Rather, he must invoke the Fifth Amendment privilege against self-incrimination on a question by question basis. *See* McCORMICK, EVIDENCE §136 (1972).

[8]The four concurring Justices would not have looked to the circumstances of the case because of a belief that there are no special circumstances that would justify the use of a constitutional privilege to discredit a person who asserts it. 353 U.S. at 425.

1956) (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957)

This danger is drastically increased when the jury members are solemnly instructed that they may consider the defendant's prior silence in assessing his credibility. Even if they are instructed to consider the silence as impeachment evidence only, and not as evidence of guilt, they surely will draw the impermissible inference. The limiting instruction would tell them, in effect, that they could use the defendant's silence to conclude that he was lying when he said he was innocent but that they were forbidden from using it to find that he was guilty. This fine distinction is too much to ask a jury. "Certainly it is inconceivable that the average untrained jury could successfully perform such a feat of mental gymnastics." 233 F.2d at 573, *citing with approval*, Hinton, 21 ILL.L.REV. 396, 400 (1926).

As the California Supreme Court stated when disallowing the impeachment of a defendant by his invocation of the Fifth Amendment before a grand jury, in *People v. Sharer*, 61 Cal.2d 869, 395 P.2d 899, 905, 40 Cal.Rptr. 851 (1964):

> Even though [evidence of the defendant's invocation of the Fifth Amendment] was admitted for the limited purpose of impeachment, it became impossible for the jury to separate the "impeaching" nature of the evidence from the inference that defendant refused to answer because he was guilty. If the evidence did, in fact, impeach the testimony given at trial, it was only because the defendant was guilty as charged. One fact could not be true independently of the other.

> Such was more than impeachment. It was an attempt to produce indirect evidence of guilt. Viewed in that light, the evidence was not limited to impeachment, but constituted an implication of guilt, and so was inadmissible under all of the cases cited by the respondent.[10]

Analogous considerations are involved in *Stewart v. United States*, 366 U.S. 1 (1961), where the defendant was on trial for the third time for murder. He had been tried and convicted for the same offense twice before but on each occasion the conviction was reversed. At the third trial, unlike the first two, the defendant took the stand to testify in his own defense. The defense was insanity and his testimony was characterized by the Court as "gibberish without meaning." The prosecutor on cross-examination brought out the fact that the defendant had not testified in his previous two trials, exercising his right to remain silent. The Court held that there was no inconsistency between the prior silence and the testimony offered at trial, and that the question was prejudicial because the jury may have drawn any one of several possible adverse inferences: 1) that the defendant had elected to feign this testimony out of desperation brought on by his failure

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[10]In a similar context, this Court has recognized that a jury will not follow limiting instructions on the admissibility of an involuntary confession. *Jackson v. Denno*, 378 U.S. 368, 388-89 (1964). In general, when a specific constitutional right is at stake a defendant must be protected against the possibility that the jury will disregard the instruction to consider a piece of evidence for a limited purpose only and not for guilt. *Compare Jackson* with *Spencer v. Texas*, 385 U.S. 554, 564-65 (1967); *cf. Loper v. Beto*, 405 U.S. 473, 482 n.11 (1972).

to gain acquittal in the two earlier trials, 2) that it was unlikely that a disease that had manifested itself only one out of three times at trial was active at the time of the homicide, or 3) that the defendant's failure to testify at his earlier trials indicated that his mental condition was worsening since the time of those trials and the homicide.[11]

The United States Courts of Appeals, who have considered the issue of whether silence at the time of arrest can be used to impeach a defendant who takes the stand at trial and offers exculpatory testimony, have, with the exception of the Third and Fifth Circuits, held that such impeachment is improper: a) D.C. Cir. - *United States v. Anderson*, 498 F.2d 1038 (D.C. Cir. 1974), Petition for Certiorari 1A; *Gillison v. United States*, 399 F.2d 586 (D.C. Cir. 1968); b) First Circuit - *Fagundes v. United States*, 340 F.2d 673 (1 Cir. 1965); c) Second Circuit - *United States v. Semensohn*, 421 F.2d 1206 (2 Cir. 1970); *See also United States v. Gross*, 276 F.2d 816 (2 Cir. 1960); d) Sixth Circuit - *United States v. Brinson*, 411 F.2d 1057 (6 Cir. 1969); e) Ninth Circuit- *Fowle v. United States*, 410 F.2d 48 (9 Cir. 1969); f) Tenth Circuit - *Deats v. Rodriquiz*, 477 F.2d 1023 (10 Cir. 1973); *Johnson v. Patterson*, 475 F.2d 1066 (10 Cir. 1973).

The Seventh and Eighth Circuits have not yet considered the issue and the Fourth Circuit has not

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[11]No cautionary instruction was given in *Stewart* and as the Court pointed out:

> [T]he danger of the situation would have been increased by a cautionary instruction in that such an instruction would have again brought the jury's attention to petitioner's piror failure to testify. [366 U.S. at 10].

directly dealt with the issue. *See United States v. White*, 377 F.2d 908, 210-11 (4 Cir. 1967) which suggests such impeachment may be proper. *But cf., United States v. Ghiz*, 491 F.2d 599 (4 Cir. 1974).

The Third Circuit has twice considered the issue and their position is not entirely clear. *Agnellino v. New Jersey*, 493 F.2d 714 (3 Cir. 1974); *United States ex rel. Burt v. New Jersey*, 475 F.2d 234 (3 Cir. 1973).[12]

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[12]In *Burt* the defendant was on trial for murder and his defense was that the shooting was accidental. The defendant had been arrested for breaking and entering some time after the shooting had occurred. At that time the police knew of no connection between Burt and the shooting and Burt never told them about the shooting. At the trial the prosecutor brought out on cross-examination that Burt never sought aid for the victim or told the police about the shooting. The per curiam opinion held that such impeachment was proper because the silence of Burt occurred prior to being accused of the crime. The two concurring judges felt that the silence at the police station was inconsistent with Burt's trial testimony and thus could be used to impeach that testimony.

In *Agnellino* the defendant was arrested for receiving stolen goods and his property was successfully searched for a variety of stolen goods. After receiving his *Miranda* warnings, the defendant made certain statements about the goods but did not say where he had obtained them. At trial the defendant testified that he had purchased the goods and the prosecutor commented on the defendant's failure to tell this to the police when he was arrested. The lead opinion held that such comment on credibility was permissible, relying on the concurring opinion in *Burt*. The other two judges on the panel each wrote concurring opinions, expressing their view that a comment on the defendant's silence, which would have been improper, was not involved in this case; rather, the impeachment was directed to the differences in the defendant's statements after his arrest and his testimony at trial. Chief Judge Seitz in his concurring opinion viewed *Burt* as a case which involved impeachment by the "non-action" of not seeking assistance for the victim rather than a case of impeachment by "non-speech."

The Fifth Circuit has considered the use of silence at the stationhouse to impeach exculpatory testimony on several occasions. *United States v. Fairchild*, 505 F.2d 1378 (5 Cir. 1975); *United States v. Quintana-Gomez*, 488 F.2d 1246 (5 Cir. 1974); *Unites States v. Ramirez*, 441 F.2d 950 (5 Cir. 1971); *Sharp v. United States*, 410 F.2d 969 (5 Cir. 1969). Such impeachment was found to be proper in *Quintana-Gomez, Ramirez,* and *Sharp*, but it was held improper in *Fairchild* which limits the holding in the earlier cases.[13]

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[13] *Quintana-Gomez* and *Ramirez* both involved the defense of duress: in the former case that others had forced the defendants to carry cocaine ashore and in the latter that strangers had forced the defendant to sell heroin. In *Fairchild*, the defendant was charged with transporting stolen cars across the state line. He testified at his trial that he had received the cars from a third person in what he believed to be a legitimate transaction. This exculpatory testimony was impeached by his silence at the stationhouse. The court found the impeachment improper, stating:

> We have held that, in extreme cases, silence following *Miranda* warnings can be the type of act which is inconsistent with certain exculpatory trial testimony. In such cases evidence of the silence is admissible.... But, to be admissible, keeping silence must be much more than ambiguous. It must appear to be an act blatantly inconsistent with the defendant's trial testimony. This will be the case when, as in *Ramirez* and *Quintana-Gomez*, the exculpatory testimony is of such a character that reasonable men would be left with the distinct impression that had it been true it would have been related to law enforcement authorities *even though* the defendant was specifically informed that he need not speak.... After Fairchild had been informed that he had the right not to speak until his lawyer was present he did what a reasonable man could be expected to do–he remained silent. [505 F.2d at 1382].

The Third and Fifth Circuits relied heavily on *Harris v. New York*, 401 U.S. 222 (1971), to justify impeachment of the defendant's trial testimony by his silence at the police station, as does the government in this case. That reliance is misplaced. The court held in *Harris* that a defendant could not remain free to offer perjurious testimony merely because his admittedly voluntary statements to police, which contradicted his testimony, had been given before he received the *Miranda* warnings. Two considerations underlie the *Harris* decision, and neither is present here. First, the *Miranda* exclusionary rule, which was the only bar to the admissibility of the defendant's statements, serves only to motivate the police to give the prescribed warnings, a purpose that would not be sacrificed if statements were let in for impeachment. 401 U.S. at 224; *see Michigan v. Tucker*, 417 U.S. 433 (1974); *People v. McColor*, 36 Mich. App. 455, 194 N.W.2d 99 (1972). More than a prophylactic rule is at stake in the present case. The defendant's Fifth Amendment right to remain silent is involved, because the no comment rule is an integral part of that right. *See Griffin v. California*, 380 U.S. 609, 614 (1965). Second, the impeachment evidence in *Harris* was an inconsistent statement which showed clearly that the defendant was prejuring himself, and it was the most convincing evidence of that fact. *See* 401 U.S. at 225. As discussed above, the defendant's silence at the stationhouse is not inconsistent and shows nothing about his truthfulness at trial. If the government believes that he perjured himself, it will need far more convincing evidence of that than the fact that the defendant remained silent when arrested.

In *Loper v. Beto*, 405 U.S. 473 (1972), the Court distinguished *Harris* for similar reasons. There the Court reversed a conviction because the credibility of the defendant, who had testified at trial, was impeached by his prior convictions even though the state obtained those convictions without respecting the defendant's right to counsel. The court noted that "[t]his is not a case where the record of a prior conviction was used for the purpose of directly rebutting a specific false statement made from the witness stand." 405 U.S. at 482 n. 11. Presumably, the court meant that Loper was not impeached for denying on direct examination the fact that he had been convicted for prior offenses. Similarly, the testimony that was impeached in the present case did not include an assertion that the defendant had told the police the source of his money.

The cases in the Third and Fifth Circuits, although they misapply *Harris*, can be harmonized with the D.C. Circuit decision in this case. Those cases allowed impeachment by evasive statements made by defendants at the time of arrest, *see Agnellino v. New Jersey*, 493 F.2d 714 (3 Cir. 1974), or blatantly inconsistent conduct before the defendant was accused of the crime in issue, *see United States ex rel Burt v. New Jersey*, 475 F.2d 234 (3 Cir. 1973), or blatantly inconsistent failure to explain the circumstances, *United States v. Quintana-Gomez*, 488 F.2d 1246 (5 Cir. 1974); *United States v. Ramirez*, 441 F.2d 950 (5 Cir. 1971); *see United States v. Fairchild*, 505 F.2d 1378 (1975).

B. The prejudicial effect of the evidence of the defendant's prior silence at the stationhouse violates the privilege against self-incrimination.

When the Court held that a defendant's trial testimony was improperly impeached by his invocation of the Fifth Amendment before a grand jury in *Grunewald v. United States*, 353 U.S. 391 (1957), it did so in the exercise of its "supervisory power" over "federal criminal justice", 353 U.S. at 424, because of the "grave constitutional overtones" of the issue presented. 353 U.S. at 423. As explained above, the court reasoned that the invocation of the privilege carried little probative weight and that that value was "far outweighed" by the possible prejudice to the defendant. 353 U.S. at 424. This reasoning runs parallel to the test ordinarily applied to determine the admissibility of a proposed piece of evidence. *See* Fed.R.Evid. 403. Yet the "constitutional overtones" of that case have become even graver since it was decided.

In an ordinary question of admissibility, the test of prejudice of proferred evidence is whether it "may unduly arouse the jury's emotions of prejudice, hostility, or sympathy." McCORMICK, EVIDENCE §185, at 439 (1972). The undue prejudice that the Court feared in *Grunewald* belonged to a special class. The Court wanted to avoid "the danger that the jury made impermissible use of the testimony by implicitly equating the plea of the Fifth Amendment with guilt. . . ." 353 U.S. at 424. At the time that *Grunewald* was decided, it had not yet been declared that such impermissible use constituted a violation of the self-incrimination clause. The Court had previously held

that a presumption of wrong-doing from the invocation of the privilege could violate due process because it was irrational. *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956), cited in *Grunewald* with approval, 353 U.S. at 421. Much earlier, the Court had held that a federal statute prohibited the inference of guilt from a defendant's failure to take the stand during his trial for violation of federal criminal law. *Wilson v. United States*, 149 U.S. 60 (1893); *see Griffin v. California*, 380 U.S. 609, 612 (1965) (*Wilson* is a statutory holding). Given this background, the *Grunewald* Court could hold, pursuant to its supervisory power, that the impeachment of Halperin was improper without necessarily holding that the impeachment was unconstitutional, as a violation of the self-incrimination clause.

Because *Wilson* settled the matter in federal courts, the Court was not called upon to decide whether the inference of guilt from the invocation of the privilege against self-incrimination violated the self-incrimination clause until that clause was declared enforceable against the states in *Malloy v. Hogan*, 378 U.S. 1 (1964). In the term following the *Malloy* decision, the Court held that the privilege against self-incrimination is violated when the jury is permitted to infer guilt from the invocation of that privilege by the accused. *Griffin v. California*, 380 U.S. 609 (1965). *Griffin* elevated *Grunewald* to a constitutional holding because it declared that the impermissible inference that the *Grunewald* Court feared would be drawn if the impeachment were allowed, constituted a violation of the self-incrimination clause. In short, the impeachment was improper because it violated the "no-comment" rule.

The attempted impeachment in the present case, like the impeachment in *Grunewald*, had but little probative force. And like the impeachment in *Grunewald*, it prejudiced the defendant by allowing the jury to draw the impermissible inference of guilt from the invocation of the privilege against self-incrimination. Thus, under *Grunewald* and *Griffin*, the impeachment, of Mr. Hale's trial testimony constituted a violation of the privilege against self-incrimination.

II.

A DEFENDANT WHO TESTIFIES AT TRIAL DOES NOT RETROACTIVELY WAIVE HIS CONSTITUTIONAL RIGHT TO REMAIN SILENT DURING CUSTODIAL INTERROGATION.

A. The right to remain silent at trial and the right to remain silent during custodial interrogation are severable rights.

" 'Waiver' is a vague term used for a great variety of purposes, good and bad, in the law." *Green v. United States*, 355 U.S. 184, 191 (1957). A defendant who voluntarily takes the stand at his trial necessarily waives his right to silence at that proceeding; the act of testifying constitutes the waiver. McCORMICK, EVIDENCE §132 (1972). In addition, he waives any right to conceal during cross-examination his knowledge of the facts in issue. *E.g., Fitzpatrick v. United States*, 178 U.S. 304 (1900). Because the defendant who takes the stand offers himself as a person who is innocent of

wrong-doing, *but cf. Stewart v. United States*, 366 U.S. 1 (1961), it is logical and constitutionally permissible for the jury to draw an inference of guilt from evasive or incomplete testimony. *See Caminetti v. United States*, 242 U.S. 470 (1917); *People v. Perez*, 65 Cal.2d 615, 422 P.2d 597, 55 Cal.Rptr. 909 (1967).

Such a "waiver" does not perforce extend back in time to a prior invocation of the right to remain silent. The right to remain silent during custodial interrogation is a distinct right from the right to remain silent during trial. The Court recognized that a defendant who testifies at trial does not by that act retroactively waive his prior reliance on the privilege against self-incrimination in *Leary v. United States*, 395 U.S. 6 (1969). The Court held Leary did not waive his Fifth Amendment challenge to the Marihuana Tax Act, 26 U.S.C. §§4741 et seq., when he took the stand and testified concerning the matters he asserted he could not be compelled to divulge under that Act's registration requirements. The Court observed that two distinct rights were involved. The right that Leary asserted was "not the undoubted right of an accused to remain silent at trial. It is instead the right not to be criminally liable for one's previous failure to obey a statute which required an incriminatory act." 395 U.S. at 28.

Other courts have used similar reasoning to find that a waiver of the Fifth Amendment privilege at one proceeding was not a waiver of the privilege at another. It has been held, for example, "that a witness . . . who testified to a matter before the grand jury did not thereby waive her right to claim her constitutional privilege against self-incrimination as to the same

subject matter when called as a witness in the subsequent trial of a person indicted by the Grand Jury." *In re Neff*, 206 F.2d 149, 152 (3 Cir. 1953). *See also United States v. Johnson*, 488 F.2d 1206, 1210 (1 Cir. 1973); *but see Ellis v. United States*, 416 F.2d 791 (D.C. Cir. 1969). The Second Circuit has held that a witness who waived his Fifth Amendment privilege by making incriminating statements to the F.B.I. did not thereby waive his right to refuse to make the same statements before a grand jury because "a waiver of the privilege in one proceeding does not affect the rights of a witness or the accused in another independent proceeding." *United States v. Miranti*, 253 F.2d 135, 139 (2d Cir. 1958). *See United States v. Burch*, 490 F.2d 1300, 1303 (8 Cir. 1974). And this same principle will permit a witness to refuse to repeat answers he made to the same grand jury if there has been a substantial period of time between his two appearances and if the grand jury has in the meantime begun to investigate unrelated crimes. *Miranti*, 253 F.2d at 140. Similarly, a defendant who testifies in his own defense at trial cannot be impeached for his earlier silence at the preliminary hearing, *People v. Jordan*, 7 Mich. App. 28, 151 N.W.2d 242 (1967), nor by his invocation of the privilege when called as a witness in the earlier trial of a co-defendant, *Dean v. Commonwealth*, 209 Va. 666, 166 S.E.2d 228 (1969). *See also* the discussion of the severability of the right to remain silent at arrest and the right to remain silent at trial in *People v. Rolston*, 31 Mich. App. 200, 187 N.W.2d 454 (1971).

There is no sound reason why a defendant who elects to testify should be deemed to have waived his right to

remain silent during custodial interrogation.[14] The fact that a defendant maintained silence during custodial interrogation sheds no light on his credibility as a witness, at least on the facts of this case. *See* Argument I.A., *supra*. A defendant's assertion on the witness stand that he is innocent is "perfectly consistent" with his earlier desire not to talk to the police. *Cf. Leary v. United States*, 395 U.S. 6, 28 (1969). An uncounseled arrestee is entitled to maintain his silence at the stationhouse: because his statements, though consistent with his innocence, might provide evidence against him, *cf. Grunewald v. United States*, 353 U.S. 391, 421-22 (1957); because he fears that the coercive circumstances of custodial interrogation will cause him to misstate the facts or will result in a misinterpretation of his words, *cf. Miranda v. Arizona*, 384 U.S. 436, 466 (1966); because the arrestee realizes that unlike a subpoenaed witness, he is under no duty to speak, *United States v. Brinson*, 411 F.2d 1057, 1060 (6 Cir. 1969); or because he has been expressly warned that he has an absolute right to remain silent, *Miranda v. Arizona*, 384 U.S. 436, 468 (1966); *cf. Johnson v. United States*, 318 U.S. 189, 197 (1943). Preservation of these protections of the privilege against self-incrimination requires that an accused not be penalized for the exercise of his rights and not be compelled or encouraged to abandon the shield of silence. *Cf. Brooks v. Tennessee*, 406 U.S.

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[14] *See* Federal Rules of Evidence, Rule 608(b):

> The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

605, 611 n. 6 (1972); *United States v. Jackson*, 390 U.S. 570, 583 (1968).

B. The present case is not controlled by the Court's decision in Raffel v. United States, 271 U.S. 494 (1926).

In 1926 the Court held that the privilege against self-incrimination permitted certain impeachment by a defendant's invocation of his Fifth Amendment right. *Raffel v. United States*, 271 U.S. 494 (1926). At the defendant's first trial, a government agent testified, attributing an incriminating statement to the defendant, who did not take the stand to deny the attribution. The trial ended with a hung jury. When the defendant was retried, the agent repeated his testimony, but the defendant took the stand and denied having made the statement. The Court held that the Constitution was not violated when the government impeached his testimony at the second trial by the fact that he remained silent at the first.

Raffel, however, is not controlling in the present case. The *Raffel* Court observed that the rule it was adopting would not deter defendants at their first trial from remaining silent because the possibility of a second trial would then seem remote, and they would feel far greater pressure to testify at the first trial from the fact that the jury would observe their silence and could draw the impermissible inference of guilt from this observation. 271 U.S. at 489-499. The present case involves silence at the stationhouse followed by testimony at trial. There is less reason to find that

shedding the privilege at trial should mean forfeiting it at the stationhouse. A defendant who has just been arrested will be fully conscious of the very real possibility of a jury trial. Extension of the *Raffel* rule would thus create a significant pressure on the accused to speak at the stationhouse from fear that his silence will be used to impeach his testimony at his later trial. And the accused at the police station will experience no pressure comparable to the pressure to testify that a defendant at his first trial will feel from the fear that a jury will infer guilt from silence. Consequently, that pressure arising from the possibility of later impeachment will make a real difference at the stationhouse, while it is unlikely to play a significant role at a first trial.

The specific holding of *Raffel* was limited in *Stewart v. United States*, 366 U.S. 1 (1961), to situations in which a defendant at his first trial has failed to deny a statement that a witness has attributed to him but takes the stand at his second trial to deny making the statement. Otherwise there is no "specific testimony" to impeach by the defendant's prior silence, and the impeachment is impermissible as involving only "general credibility." 366 U.S. at 6, 7 n.14. The present case simply is not within *Raffel* as so limited. *See People v. Bobo*, 390 Mich. 355, 212 N.W.2d 190, 192 (1973).

In recent years the Court has not once followed *Raffel*. It has confined that case to its particular facts. In *Grunewald v. United States*, 353 U.S. 391 (1957), the Court unanimously refused to follow *Raffel* and held improper the impeachment of a defendant's trial testimony by his assertion of the privilege against self-incrimination before a grand jury. Four members of

the Court were prepared to declare *Raffel* overruled. 353 U.S. at 423 (Black, J., concurring). Five members of the Court, apparently preferring not to reach constitutional issues if other grounds for decision could be found, held the impeachment improper, finding that the trial testimony of the defendant was not sufficiently inconsistent with his prior invocation of the privilege, 353 U.S. at 420-22.

Again in *Stewart v. United States*, 366 U.S. 1 (1961), the Court did not follow *Raffel*. A defendant in a homicide prosecution, whose only defense was insanity, took the stand apparently in order to demonstrate his unsound mind. His testimony was incoherent. The government confronted him on cross-examination with the fact that he had not taken the stand at prior trials for the same offense. As in *Grunewald*, the Court held that there was no inconsistency between the prior silence and the testimony offered at trial. "There was no specific testimony to impeach." 366 U.S. at 6. Nor was the error harmless because the impeachment could have led the jury to infer that the defendant was feigning insanity or that he had developed a mental disease after the homicide. Three dissenting members of the Court apparently agreed generally with the majority's legal analysis but disagreed with the majority's reading of the record. 366 U.S. at 11 (Frankfurter, J.).

Raffel should be declared overruled. Indeed, it has been argued that *Raffel* was overruled a generation ago in *Johnson v. United States*, 318 U.S. 189 (1943). *See Grunewald v. United States*, 353 U.S. 391, 426 (1957) (Black J., concurring); *United States v. Grunewald*, 233 F.2d 556, 574-75 (2 Cir. 1956) (Frank, J., dissenting).

In addition to limiting *Raffel* to its own facts, the decision in *Stewart* implicitly overruled *Raffel* on all but its own facts. The cross-examination of Stewart's trial testimony was plainly probative because it undercut the inference that his counsel sought the jury to draw from listening to it, that Stewart was insane at the time of the crime. This probativity was the reason that the Court could find that the cross-examination was prejudicial, because it supported a rational inference that the insanity displayed on the witness stand was feigned or that it had developed only after the crime. 366 U.S. at 8-9. Even though there was no "contradiction" of the trial testimony in any literal sense, it is thus clear that the cross-examination rationally undercut Stewart's "testimony." Therefore, when the Court held that the cross-examination was improper the underlying reason must have been that it violated the privilege against self-incrimination. And a necessary assumption for this conclusion is that Stewart's act of taking the stand did not retroactively "waive" the protection of the Fifth Amendment as to his silence at his prior trials. Hence, unless prior silence is used to impeach some "specific testimony"–i.e., unless it is used to impeach a defendant's denial of a statement attributed to him, as in *Raffel–Stewart* suggests that there is no waiver of a prior invocation of the privilege.

Any life still lingering in *Raffel* expired after this Court's decision in *Griffin v. California*, 380 U.S. 609 (1965). As asserted above, *Griffin* elevated *Grunewald* to a constitutional holding because the *Griffin* Court held that the inference of guilt from a defendant's invocation of the privilege is unconstitutional and

because the *Grunewald* Court had found the impeachment improper because just such an inference would be drawn. *See* Argument I.B., *supra*. For the same reason, *Griffin* implicitly overruled *Raffel*. Impeachment of the defendant in *Raffel*, like impeachment of the defendant in *Grunewald*, by his prior reliance on the privilege would permit the jury to use his exercise of a constitutional right not only to judge credibility but also to infer guilt. Under *Griffin*, impeachment of Raffel imposed an impermissible penalty on that right.[15] As suggested below, other recent cases striking down penalties on the exercise of constitutional rights require a finding that the impeachment in the present case was unconstitutional, *see* Argument IV, A and C *infra*, and for similar reasons they have implicitly overruled *Raffel*. *See, e.g., Brooks v. Tennessee*, 406 U.S. 605 (1972).

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[15]Prior to *Griffin*, this Court had not held that an inference of guilt from a defendant's failure to take the stand violated the privilege against self-incrimination. The Court had held that a federal statute prohibited such an inference in federal courts. *Wilson v. United States*, 149 U.S. 60 (1893). Significantly, *Raffel* fails to discuss or even to cite *Wilson*, probably because *Raffel* was decided at a time when the Supreme Court was "manifesting a marked hostility to the constitutional privilege and [was] severely modifying its scope." *United States v. Grunewald*, 233 F.2d 556, 577 (2 Cir. 1956) (Frank, J., dissenting). The *Raffel* Court said that it could "concede, without deciding," that unless a defendant testified, evidence of his prior silence "would be probative of no fact in issue, and would be inadmissible," 271 U.S. at 497, yet this "assumption" would seem to be compelled by the Court's holding in *Wilson*. It is thus open to substantial doubt whether *Raffel* is consistent even with *Wilson*. *See* 233 F.2d at 572-73.

III.

IT IS UNFAIR TO THE UNCOUNSELED ACCUSED WHO HAS BEEN GIVEN THE *MIRANDA* WARNINGS TO IMPEACH HIS TRIAL TESTIMONY WITH HIS SILENCE AT THE STATIONHOUSE.

An arrested accused is informed by the police that he has the right to remain silent, that anything he says can be used against him, that he has the right to consult with a lawyer and to the presence of a lawyer during questioning, and that if he cannot afford a lawyer, one will be appointed to represent him prior to any questioning. Allowing an accused who elects to exercise his rights and remain silent until he speaks with a lawyer, to be impeached with his silence when he takes the witness stand at trial is grossly unfair. The message that the police give the accused is not only that if he speaks, his words may be used against him, but also the converse–that if he remains silent, his silence will not be used against him. When an accused is told that he has the right to remain silent, the natural import of the warning is that his silence will not be used against him. It is an unnatural act[16] for the accused to talk after the police have told him that if he talks he may damage his case but if he keeps silent, he will not be penalized.[17]

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[16]*See generally* 8 WIGMORE, EVIDENCE §2251 (McNaughton rev. 1961) 317.

[17]The *Miranda* warnings could be viewed as a promise by the police that the accused's silence won't be used against him. The accused may rely on that implied promise and remain silent. If that is the case and his silence is later used against him at trial

An uncounseled accused receiving the *Miranda* warnings will not understand them to mean that if he remains silent the prosecutor may bring that fact to the attention of a jury by impeacing the accused's trial testimony. This fact was recognized many years ago in *McCarthy v. United States*, 25 F.2d 298, 299 (6 Cir. 1928), where it was stated that if the silence of the accused was to be used against him, he should be warned: "If you say anything, it will be used against you; if you do not say anything, that will be used against you." This position has received recent support. *United States v. Anderson*, 498 F.2d 1038 (D.C. Cir.

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for impeachment purposes, the situation becomes analogous to the use of an involuntary confession for impeachment.

A confession may be involuntary because coerced by threats *or* by promises of leniency. *See* McCORMICK, EVIDENCE § 150 (1972). Even very slight promises made by the police may render a confession involuntary. *See Malloy v. Hogan*, 378 U.S. 1, 7 (1964); *Bram v. United States*, 168 U.S. 532 (1897). An involuntary confession cannot be used for purposes of impeachment because it is of questionable trustworthiness. *People v. Reed*, ____ Mich. ____, 224 N.W.2d 867, 872-873 (1975); *State v. Smith*, 242 Ore. 223, 408 P.2d 942, 944 (1965). In *Harris v. New York*, 401 U.S. 222, 224 (1971), the Court stated: "Petitioner makes no claim the statements made to the police were coerced or involuntary." *Harris* allowed statements secured without giving the *Miranda* warnings to be used for impeachment purposes "provided of course that the trustworthiness of the evidence satisfies legal standards." 401 U.S. at 224.

The use of silence to impeach after an implied promise that it would not be used may be equivalent to the use of a statement to impeach after an implied promise that it would not be used. Such a statement may amount to an involuntary confession which could not be used to impeach. Silence should be treated the same.

1974), Petition for Certiorari I A; *Johnson v. Patterson*, 475 F.2d 1066 (10 Cir. 1973); *United States v. Brinson*, 411 F.2d 1057 (6 Cir. 1969); *Fowle v. United States*, 410 F.2d 48 (9 Cir. 1969).

Concern about the lack of a similar warning was involved in *Johnson v. United States*, 318 U.S. 189 (1943). In that case the defendant was on trial for income tax evasion during the years 1936 and 1937. The defendant, who took the stand in his defense, was asked on cross-examination about illegal sources of income in 1938. After he asserted his Fifth Amendment privilege the trial judge ruled that he need not answer the question, and the defendant refused to do so. However, in closing argument the prosecutor was allowed to comment on the exercise of the privilege insofar as it affected the credibility of the defendant. The Court stated:

> The ruling of the court gave the petitioner the choice between testifying and refusing to testify as to his 1938 income. An accused having the assurance of the court that his claim of privilege would be granted might well be entrapped if his assertion of the privilege could then be used against him. His real choice might then be quite different than his apparent one. Elementary fairness requires that an accused should not be misled on that score. If advised by the court that his claim of privilege though granted would be employed against himself, he well might never claim it. If he receives assurance that it will be granted if claimed, or if it is claimed and granted outright, he has every right to expect that the ruling is made in good faith and that the rule against comment will be observed . . . .

> . . . . The problem here is . . . . whether a procedure will be approved which deprives an accused on facts such as these of an intelligent choice between claiming or waiving his privilege. Knowledge that a failure to testify though permitted by the court would be submitted to a jury might seriously affect that choice. If the accused makes the choice without that knowledge, he may well be misled on one of the most important decisions in his defense. [318 U.S. at 197-199].

Similar considerations of fairness were involved in *People v. Ellis*, 65 Cal.2d 529, 421 P.2d 393, 55 Cal.Rptr. 385 (1966) where the accused, who was under arrest, prior to being placed in a lineup, was told that he had the right to remain silent and that anything he said could be used against him. When asked at the lineup to speak for a voice identification, he refused. This refusal was introduced into evidence to show a consciousness of guilt. In holding that it would be unfair to introduce evidence of the refusal to speak, the court stated:

> This warning did not distinguish between speech in terms of communication and speech for voice identification, between a refusal to speak free from sanctions and a refusal to speak productive of detrimental inference. That distinction would hardly occur to a layman unless it was called to his attention. Thus, defendant's refusal to speak might well have been the direct result of the police warning and cannot be used against him. . . . .
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> . . . . After having given such a warning, if the police direct a defendant to speak for voice identification and he refused, they must, as a prerequisite to the use of the defendant's refusal to speak as evidence of consciousness of guilt,

advise him that the right to remain silent does not include the right to refuse to participate in such a test. [421 P.2d at 398-399].

Another reason why it would be unfair to introduce evidence of stationhouse silence to impeach the trial testimony of the accused is that the police would then possess a device that would allow them to elicit incriminating evidence from arrested and uncounseled innocent and guilty alike. *Cf.*, 87 HARV.L.REV. 882, 887, n. 34 (1974). The police would be in a position to tell persons they have arrested that unless they explain while they are in custody the incriminating circumstances that led to their arrest, no jury will believe their explanations at trial. In *Miranda*, the Court discussed coercive police tactics and noted that the police were instructed to engage in tactics similar to those described above. The Court observed that such tactics subverted the privilege against self-incrimination:

> The manuals also contain instructions for the police on how to handle the individual who refuses to discuss the matter entirely, or who asks for an attorney or relatives. The examiner is to concede him the right to remain silent. "This usually has a very undermining effect. First of all, he is disappointed in his expectation of an unfavorable reaction on the part of the interrogator. Secondly, a concession of this right to remain silent impresses the subject with the apparent fairness of his interrogator." After this psychological conditioning, however, the officer is told to point out the incriminating significance of the suspect's refusal to talk:
>
> "Joe, you have a right to remain silent. That's your privilege and I'm the last person in the world who'll try to take it away from you. If that's the way you want to leave this, O.K. But let me ask you this. Suppose you were in my shoes and I were in yours and you called me in to ask me about this and I told you, 'I don't want to answer any of your questions.' You'd think I had something to hide, and you'd probably be right in thinking that. That's exactly what I'll have to think about you, and so will everybody else. So let's sit here and talk this whole thing over."
>
> Few will persist in their initial refusal to talk, it is said, if this monologue is employed correctly. [384 U.S. at 454, citations omitted].

Indeed, such tactics are not very far removed from those employed by the Star Chamber and the High Commission. The accused, who has not yet been formally charged, is placed in a position where he is submitted to interrogation without the aid of counsel. If he answers the questions he risks incriminating himself and if he does not answer the question, his silence may be used against him. This danger is illustrated in the case of *People v. Sharer*, 61 Cal.2d 869, 395 P.2d 899, 40 Cal.Rptr. 851 (1964), where the accused was charged with assault with intent to commit murder. He was called before a grand jury investigating the crime and was asked whether he had committed the assault. He invoked his Fifth Amendment privilege and refused to answer the question. At his trial the defendant testified in his defense and was impeached by his prior refusal to answer. In holding the impeachment evidence inadmissible the Court discussed the effect of allowing such impeachment:

> If answers to such [questions by the grand jury] were refused on the ground of self-incrimination, the testimony at trial would necessarily be inconsistent. If answers were refused without statement of the privilege, that fact would be alleged as an adoptive admission. If the questions were answered, attempt would be made to use the answers to convict. Thus, the district attorney was knowingly placing the accused in a dilemma not contemplated by the law. Such procedure is suspect as a calculated trap whereby the prosecutor could force the accused to incriminate himself by the very refusal to do so. [395 P.2d at 905].

Thus, the rule the government seeks would at the very least relieve the government of its burden "to shoulder the entire load." *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964).

The government argues that there is a benefit to the accused who is innocent to immediately tell the police his explanation of the suspicious circumstances that led to his arrest. Brief for the United States, 33. If he does so, the police can "independently verify" the suspect's account and will release him. A similar argument was raised in *Miranda* and the Court there stated:

> It is also urged that an unfettered right to detention for interrogation should be allowed because it will often redound to the benefit of the person questioned. When police inquiry determines that there is no reason to believe that the person has committed any crime, it is said, he will be released without need for further formal procedures. The person who has committed no offense, however, will be better able to clear himself after warnings with counsel present than

> without. It can be assumed that in such circumstances a lawyer would advise his client to talk freely to police in order to clear himself.
>
> Custodial interrogation, by contrast, does not necessarily afford the innocent an opportunity to clear themselves. [384 U.S. at 482].

In this case, Mr. Hale had been identified by the victim as one of the men who had robbed him and Mr. Hale had fled from the police. (Tr. 39-40) Assuming that Mr. Hale had told the police he received the money found on him from his wife, it is absurd to suggest that the police, even if they had verified this by speaking to Mrs. Hale, would have released Mr. Hale.

The government argues that modifying the *Miranda* warnings to include the information that if the accused remained silent, that fact can be used to impeach exculpatory testimony offered by the accused at trial, will confuse an accused about his constitutional rights. Brief for the United States, n. 14. Respondent agrees. Indeed, such a rule would make the right to counsel prior to questioning even more important than it is now.[18] In order to protect the accused's right to remain

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[18]One can well imagine an innocent accused who is informed of the possible use of silence to impeach being compelled by that fact to reveal circumstances that, though consistent with his innocence, might constitute evidence against him or lead to the discovery of such evidence. Such compulsion is forbidden. *See Grunewald v. United States*, 353 U.S. 391, 421-22 (1957); *cf. Hoffman v. United States*, 341 U.S. 479, 486 (1951). For example, a person arrested for homicide who killed in self-defense should be free to maintain his silence during police custody. If he could be pressured into revealing the circumstances of the killing, his statements, though consistent with his innocence, would certainly be incriminating evidence. In addition,

silent and to insure fair treatment of the accused by the police at the stationhouse, the best policy would be to continue the *Miranda* warnings in their present form and disallow the impeachment use of defendant's silence.

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the excitement created by the arrest and the coercion inherent in custodial interrogation make it likely that an innocent defendant who is compelled to explain himself will misstep and either incriminate himself directly or contradict his later truthful testimony at trial. *See generally* Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV.L.REV. 42 (1968). A further danger is that the police will misinterpret the words of the accused and testify inaccurately about what was actually said. Silence, on the other hand, is silence.

The rule the government seeks would also permit the police to coerce guilty defendants into confessing by exploiting their ignorance of the law and mistaken belief in their innocence. An example of such exploitation is described in *Escobedo v. Illinois*, 378 U.S. 478 (1964). Police in that case persuaded the accused during custodial interrogation that it would be to his advantage to pin the homicide in question on his companion, exploiting his ignorance of the fact that his "exculpating" statement made him fully liable as his companion's accessory. *See* 378 U.S. at 482-83, 486. One can imagine the police giving *Miranda* warnings but advising a defendant in Escobedo's position that unless he gave his full explanation to them, a jury would never believe his testimony at trial that his companion had held the gun.

IV.

IMPEACHING THE DEFENDANT'S TRIAL TESTIMONY BY HIS SILENCE IN THE FACE OF CUSTODIAL INTERROGATION IMPOSES AN IMPERMISSIBLE PENALTY ON HIS RIGHT TO REMAIN SILENT.

A. Allowing comment on the defendant's assertion of the privilege penalizes the privilege by making its assertion costly.

In *Griffin v. California*, 380 U.S. 609 (1965), the Court held that the Fifth Amendment privilege against self-incrimination was violated when a prosecutor argued that the defendant's silence at trial indicated his guilt and when the judge instructed the jury that they could draw this inference. Such comment is "a remnant of the 'inquisitorial system of criminal justice,'" "is a penalty imposed by the courts for exercising a constitutional privilege," and "cuts down on the privilege by making its assertion costly." 380 U.S. at 614. *See also Wilson v. United States*, 149 U.S. 60 (1893) (statutory "no comment" rule in federal prosecutions).

In *Miranda v. Arizona*, 384 U.S. 436 (1966) this Court held that the privilege against self-incrimination guaranteed the right of a defendant in a state prosecution to remain silent during custodial interrogation at the police stationhouse, thus applying to the states a rule that had long before been held applicable to the federal government. *Bram v. United States*, 168 U.S. 532 (1897); *see generally Michigan v. Tucker*, 417 U.S. 433, 441 and n. 15 (1974). As the *Miranda* Court

indicated, a necessary corollary of its holding was that the *Griffin* "no comment" rule must apply to silence at the stationhouse:

> In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. *Cf. Griffin v. California*, 380 U.S. 609 (1965) [384 U.S. at 468 n. 37].

The "no comment" rule is, if anything, more important to the integrity of the privilege during custodial interrogation than at trial. A jury will be aware of the fact that a defendant has not testified even if it is not drawn to their attention. *Griffin v. California*, 380 U.S. 609, 621 (1965) (Stewart, J., dissenting). They possess the knowledge and the power to draw the impermissible inference of guilt from the defendant's silence even if they are instructed to ignore it. *See Bruno v. United States*, 308 U.S. 287, 293 (1939). In contrast, a jury will ordinarily have no way of knowing that a defendant was silent during custodial interrogation unless the prosecutor violates the no comment rule by introducing evidence on this fact.

Lower federal courts have uniformly held that a defendant's silence during custodial interrogation cannot constitutionally be admitted on the question of guilt. *E.g., United States v. Ghiz*, 491 F.2d 599 (4 Cir. 1974); *United States v. Kroslack*, 426 F.2d 1129 (7 Cir. 1970); *United States v. Arnold*, 425 F.2d 204 (10 Cir. 1970); *United States ex rel. Smith v. Brierly*, 384 F.2d 992 (3 Cir. 1967); *United States v. McKinney*, 379 F.2d 259

(6 Cir. 1967); *Helton v. United States*, 221 F.2d 338 (5 Cir. 1955); *United States v. Lo Biondo*, 135 F.2d 130 (2 Cir. 1943). There is no sufficient reason to make an exception for comment in the form of impeachment of a defendant's testimony at trial.

The defendant who takes the stand will suffer a penalty if the government is allowed to impeach his testimony by his silence during police interrogation, and this penalty is as heavy as the penalty a non-testifying defendant would suffer if the government used his prior silence in its case-in-chief.[19] Even if the judge instructs the jury that they may consider the silence only as impeachment evidence and not as evidence of guilt, there is the danger that the jury will draw the inference of guilt that was held unconstitutional in *Griffin*. *Grunewald v. United States*, 353 U.S. 391, 424 (1957); *see* Argument I.A. *supra*.

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[19]In *Miranda*, the Court held that if the accused made statements during custodial interrogation without having been advised of his rights and without specifically waiving them, the statements must be excluded from use at trial whether exculpatory or inculpatory. It was stated at 384 U.S. at 477:

> In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used. . . .

If silence at arrest is used to impeach the defendant's trial testimony, it would "prove guilt by implication" though the silence in fact sheds no light on his credibility.

B. Allowing impeachment of a defendant's trial testimony by his silence at the stationhouse would put impermissible pressure on the privilege against self-incrimination at the time of arrest.[20]

If prosecutors are permitted to impeach defendants by their prior silence, and if juries are instructed that they may disbelieve a defendant's trial testimony merely because he was silent when arrested, then the right to testify at trial will be undercut. This right is protected by the Constitution and, in federal courts, by statute. *Ferguson v. Georgia,* 365 U.S. 570, 602-03 (1961) (Clark, J., concurring); 18 U.S.C. §3481 (1970).

The present case is analogous to *Brooks v. Tennessee,* 406 U.S. 605 (1972). In that case the Court held unconstitutional a state procedure that required a defendant to testify immediately after the close of the government's case, before he had presented any other evidence, or to forfeit his right to testify. 406 U.S. at 606. This procedure was infirm because it imposed a penalty on the defendant's exercise of his right to remain silent by depriving him of his right to testify. "[T]he Tennessee rule imposed a penalty for petitioner's initial silence, and that penalty constitutes the infringement of the right." 406 U.S. at 611 n.6. Although the Court recognized some state interest "in preventing testimonial influence," this was held insufficient to validate the penalty. 406 U.S. at 611. The

[20] *See generally Spevack v. Klein,* 385 U.S. 511 (1967); *Garrity v. New Jersey,* 385 U.S. 493 (1967); Argument III, *supra* at n. 18.

same interests are at stake in the present case. Here, too, the government is seeking to penalize a defendant for the exercise of his right to remain silent by depriving him of the full benefits of his right to testify. The defendant's Fifth Amendment interests at stake in the present case are, in fact, weightier than those at stake in *Brooks.* There the question was one of timing the decision to testify at trial; a defendant who could wait until the close of his case to decide whether or not to testify could better judge the tactical advantages than could a defendant who was required to make this decision before he learned how well the rest of his case had gone. *See* 406 U.S. at 609. If the government obtains the rule it seeks in the present case, then a defendant who seeks to preserve his full right to testify at trial will have to provide the government, at the time of his arrest, with information that will relieve it of its burden "to shoulder the entire load," and will have to surrender his right to silence insofar as it is "a protection to the innocent." *See Murphy v. Waterfront Commission,* 378 U.S. 52, 55 (1964). In addition, this decision at the stationhouse must be made without "the guiding hand of counsel." *Cf. Escobedo v. Illinois,* 378 U.S. 478, 486 (1964).

Another analogy can be found in this Court's decision in *Loper v. Beto,* 405 U.S. 473 (1972). There the Court reversed a conviction because the defendant's trial testimony was impeached by his prior convictions, although the state had obtained those convictions at a trial in which the defendant was denied his right to counsel. 405 U.S. at 474-77; *see Gideon v. Wainwright,* 372 U.S. 335 (1963). There the government benefited from the fact that it had denied a defendant his

constitutional right to counsel, *see* 405 U.S. at 482; here the government exploited the fact that the defendant exercised his constitutional right to silence. There, the impeachment evidence was unreliable because the convictions had been obtained without counsel, 405 U.S. at 483-84; here the impeachment evidence was unreliable because the defendant was silent in the exercise of constitutional rights that he had been specifically told he could assert.

C. Permitting impeachment of a defendant's trial testimony by his silence at the time of his arrest would unconstitutionally require the defendant to elect between constitutional rights.

If a defendant testifies at a motion to suppress evidence allegedly seized in violation of the Fourth Amendment, the government is barred from using this testimony against him at trial because if such use were allowed, a defendant would be required to choose between his Fourth and Fifth Amendment rights: he could not exercise both. *Simmons v. United States*, 390 U.S. 377, 392 (1968). *See also United States v. Carignan*, 342 U.S. 36, 38 (1951) (defendant has right to testify outside jury's presence on motion to suppress confession); *cf. Jackson v. Denno*, 378 U.S. 368, 389 n. 16 (1964). Similarly, a parolee must be permitted the opportunity to speak on his own behalf at his revocation hearing without the fear that the government will use his statement against him in a subsequent trial. *Melson v. Sard*, 402 F.2d 653, 655 (D.C. Cir. 1968).

And the government may not use the substance of a defendant's testimony in support of an application to obtain appointed counsel against him at trial because such use would require an unconstitutional election between Fifth and Sixth Amendment rights. *United States v. Branker*, 418 F.2d 378, 381 (2 Cir. 1969). Nor can the Eighth Amendment right to bail be made contingent on a waiver of the Fifth Amendment privilege against self-incrimination. *Cf. Noto v. United States*, 76 S.Ct. 255 (Harlan, Circuit Justice, 1955). The defendant in the present case exercised his Fifth Amendment right to remain silent. The government's attempted impeachment denied him the full enjoyment of his due process right to testify on his own behalf. *See Ferguson v. Georgia*, 365 U.S. 570, 602-03 (1961) (Clark, J., concurring). If such impeachment is permitted, then defendants will be required to choose between rights: they can enjoy the right to testify at trial or the right to remain silent at the stationhouse, but they cannot exercise both fully. The Court held just such a choice unconstitutional in *Brooks v. Tennessee*, 406 U.S. 605 (1972).

A contrary result is not required by the Court's decision in *McGautha v. California*, 402 U.S. 183 (1971). There the Court held that the Constitution did not require the state of Ohio to hold a bifurcated trial in capital cases where juries were allowed to fix punishment at life imprisonment or death. The defendant Crampton argued that a unitary trial compelled him to choose between his right to remain silent on the question of guilt and his asserted due process right to address the jury personally on the question of punishment. 402 U.S. at 208-09. The most

salient difference between this case and *McGautha* is that the rule the defendant seeks in this case would not put any burden on the state judicial systems. This difference is one reason that the *McGautha* Court did not deem *Simmons* controlling and chose not to follow *United States v. Jackson*, 390 U.S. 570 (1968). The *Jackson* Court held unconstitutional a federal kidnapping act that permitted a defendant who was convicted after trial by jury to be put to death but imposed a maximum punishment of life imprisonment on a defendant who pled guilty or who waived his right to a jury trial and was convicted by the court. *See* 390 U.S. 581. This procedure violated a defendant's Sixth Amendment right to trial by jury and Fifth Amendment right not to be compelled to plead guilty. The procedure's effect was "to chill the assertion of constitutional rights by penalizing those who choose to exercise them" and to "impose an impermissible burden" on a defendant's right by "needlessly *encourag[ing]*" guilty pleas. 390 U.S. at 581, 583 (emphasis in original). The primary distinction between *McGautha* and *Jackson* seems to be that the latter, like *Simmons*, would not require radial surgery on state court procedures. Instead of following *Simmons*, *McGautha* followed *Spencer v. Texas*, 385 U.S. 554 (1967). Like Crampton the defendant in *Spencer* unsuccessfully sought to impose a system of bifurcated trials on the states, *see* 385 U.S. at 562, by withholding from the jury information of prior convictions, to be used in sentencing, until the jury returned a verdict on the question of guilt.

The *McGautha* Court stated that the "threshold question" concerning the validity of a requirement that

a defendant choose between constitutional rights was "whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved." 402 U.S. at 213. The election Crampton was required to make survived this test because it was virtually indistinguishable from many other tactical decisions that must be made at trial. The pressure on a defendant to take the stand because of his desire to speak on the issue of punishment is much like the pressure a defendant will feel to testify because of the force of the government's case against him. 402 U.S. at 213. And the pressure a defendant will feel to forego the opportunity to speak on punishment is like the pressure a defendant will feel to avoid testifying on guilt because of the possibility of damaging cross-examination and impeachment and because the testimony might mean waiver of his motion for judgment of acquittal. 402 U.S. at 214-15. The choice that the government would require a defendant to make in the present case cannot be analogized to such decisions of trial tactics. The defendant in this case had just been arrested, was in police custody at the stationhouse, and was unrepresented by counsel. The government has conceded that the defendant could make no such tactical choice; awareness of the factors involved in the choice the government would require him to make would, the government asserts, merely "tend to confuse an arrestee about his constitutional rights . . . ." Brief for the United States at 39 n. 14.

The fact of the matter is that the defendant in the present case made no election to compromise his right to testify at trial when he remained silent at the stationhouse after he was warned of his right to silence

and that any statement could be used against him. Appendix 4. He remained silent without any warning that this silence would compromise his right to testify. Under the doctrine of *Johnson v. United States*, 318 U.S. 189 (1943), it was improper to impeach the defendant's trail testimony by the fact that he exercised a right that he had been officially told he could exercise, even if such impeachment would have been proper had the defendant been warned of this consequence of his decision to exercise the right. It is no answer to argue that an uncounseled arrestee was in no position to make an intelligent choice about his options even if they had been accurately described to him. *See* Brief for the United States at 39-40. If the decision is unfair under *Johnson* when a defendant who is guided by counsel is required to make it, the fact that a defendant is unrepresented and under arrest certainly cannot render it fair.

Assuming that the defendant in the present case was compelled to choose between his right to silence and an undiluted right to testify at trial, the controlling case is not *McGautha* but *Brooks v. Tennessee*, 406 U.S. 605 (1972). The same rights were involved in *Brooks*. The Court held that a defendant could not constitutionally be compelled to choose between his right to remain silent and his right to testify. 406 U.S. at 610-11.

D. The police have no right to take "discovery" from an uncounseled accused and the impeachment of the defendant in this case cannot be justified as a sanction imposed for his failure to provide discovery.

The Court's decision in *Williams v. Florida*, 399 U.S. 78 (1970), cannot be distorted to justify impeachment

of a defendant's trial testimony if he remains silent during custodial interrogation. The *Williams* Court held that a defendant was not constitutionally compelled to incriminate himself merely because he complied with a state notice-of-alibi rule out of fear that non-compliance would mean exclusion of his alibi evidence at trial. *See* 399 U.S. at 79-80.[21] The rule required that on written demand defendant's counsel provide the prosecution with the particulars of the alibi defense, including the names and addresses of alibi witnesses. The government was required to reciprocate with ample discovery of its case. 399 U.S. at 79. This procedure, said the Court, produced no compulsion within the meaning of the Fifth Amendment because the choice a defendant was required to make was perfectly analogous to choices he was required to make at trial. The act of putting alibi witnesses on the stand notifies the government of who these witnesses are and provides investigatory leads. Only the timing was accelerated. 399 U.S. at 84-85.

In the present case, the government is seeking to require a defendant to submit himself personally to custodial interrogation or suffer a sanction for thus refusing "discovery." This requirement would be a far cry from the acceleration of trial processes at issue in *Williams*. In addition, the advantage the government received would be unbalanced by any reciprocal discovery right due the defendant. In a later case, the Court unanimously held unconstitutional a state

[21] The Court has specifically reserved the question of whether an otherwise valid discovery order may be enforced by excluding a defendant's trial testimony. *Wardius v. Oregon*, 412 U.S. 470, 472 n.4 (1973). *Cf. Williams v. Florida*, 399 U.S. 78, 83 n. 14 (1970).

discovery procedure that required the defendant to disclose his case to the government but gave the defense no reciprocal discovery right. *See Wardius v. Oregon*, 412 U.S. 470 (1973). The defendant in that case failed to comply with a state notice-of-alibi statute and was precluded from presenting alibi witnesses or from himself testifying on his alibi. 412 U.S. at 473. Mr. Justice Marshall, speaking for seven members of the Court, said that the lack of reciprocity violated the due process clause even if valid objectives could be reached under a balanced discovery scheme:

> The State may not insist that trials be run as a "search for truth" so far as defense witnesses are concerned, while maintaining "poker game" secrecy for its own witnesses. It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.

412 U.S. at 475-76 (footnote omitted). The defense in the present case had no opportunity to discover the government's case against the defendant that would be analogous to the right the government asserts to discover anticipated defenses through custodial interrogation of the defendant. The "discovery" right the government asserts would, therefore, deny due process of law.

The government's attempt to analogize this case to *McGautha* or *Williams*, as a case involving "the accused's inherent need to make tactical judgments about the conduct of his defense," Brief for the United States at 32, or the defendant's need to weigh the

"strategic disadvantages at trial" from his course of conduct, *Id.* at 36, ignores the fact that Mr. Hale was under arrest and without counsel at the time the government would require him to decide how he would conduct his defense. The government would require a defendant to be "immersed in the intricacies of substantive and procedural criminal law," *see Kirby v. Illinois*, 406 U.S. 682, 689 (1972), before the formal initiation of a criminal prosecution and before appointment of counsel, though clearly after the time the police decided to seek prosecution. The failure to comply with the police demand for discovery would undercut the defendant's right to testify, yet the Court has long recognized that a defendant cannot be required to make a decision about that right without counsel's advice. *See Brooks v. Tennessee*, 406 U.S. 605, 612 (1972); *Ferguson v. Georgia*, 365 U.S. 570, 594-96 (1961)[22] It would therefore be improper to require a defendant to make such strategic choices at the stationhouse.

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[22]Because a defendant's right to testify at his trial is among "those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial," "any alleged waiver must meet the strict standard of an intentional relinquishment of a 'known' right." *See Schneckloth v. Bustamonte*, 412 U.S. 218, 236-237 (1973).

CONCLUSION

It is therefore respectfully submitted that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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